

After a pretrial settlement conference, the Assistant Director authorized Peter A. Bieri, M.D., to evaluate claimant and to provide his opinion of claimant's functional

impairment. Respondent and its insurance carrier requested the Appeals Board to review that Order. The issues now before the Appeals Board are:

- (1) Is a party entitled to an evidentiary hearing to challenge the appointment of an independent health care provider?
- (2) Did the Assistant Director's statements at the prehearing settlement conference establish such partiality that the case should be reassigned?
- (3) Does the Appeals Board have the jurisdiction to review the above issues?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record, the Appeals Board finds as follows:

The parties appeared before Assistant Director Brad E. Avery on March 14, 1997, for a prehearing settlement conference as required by K.S.A. 44-523(d). Because the parties could not agree upon claimant's functional impairment, at the conclusion of the prehearing settlement conference the Assistant Director appointed Dr. Bieri to evaluate claimant and report his findings of functional impairment. The Assistant Director cited K.S.A. 44-516 as the authority to enter such order.

- (1) Respondent and its insurance carrier first contend they were denied the opportunity to be heard and present evidence to oppose Dr. Bieri's appointment and also denied an opportunity for a hearing on the record.

There is no transcript from the prehearing settlement conference. The Assistant Director's Order states respondent's counsel was given the opportunity to argue its position at the prehearing conference. However, the Order does not indicate whether that opportunity included the making of a record. Respondent's brief indicates the Assistant Director denied its specific request for a record. The Assistant Director's Order also states respondent's counsel declined the opportunity to make a record the afternoon following the prehearing settlement conference. However, respondent's brief indicates its counsel was not available at that time due to scheduling conflicts. Respondent contends the notice of the proposed afternoon hearing was unreasonable and, thus, respondent has been denied the opportunity to preserve its evidence and arguments for Appeals Board review.

As indicated above, the Assistant Director cited K.S.A. 44-516 as the authority to appoint a neutral physician. That statute provides:

"In case of a dispute as to the injury, the director, in the director's discretion, or upon request of either party, may employ one or more neutral health care

providers, not exceeding three in number, who shall be of good standing and ability. The health care providers shall make such examinations of the injured employee as the director may direct.”

Although not cited, depending upon the circumstances the Assistant Director might have utilized K.S.A. 1996 Supp. 44-510e as authority to appoint the physician as it specifically authorizes evaluation by an independent health care provider when the parties cannot agree upon the worker’s functional impairment. That statute provides, in part:

“If the employer and the employee are unable to agree upon the employee’s functional impairment and if at least two medical opinions based on competent medical evidence disagree as to the percentage of functional impairment, such matter may be referred by the administrative law judge to an independent health care provider who shall be selected by the administrative law judge from a list of health care providers maintained by the director. The health care provider selected by the director pursuant to this section shall issue an opinion regarding the employee’s functional impairment which shall be considered by the administrative law judge in making the final determination.”

The Appeals Board finds the administrative law judges should be given wide latitude in selecting and appointing independent health care providers to evaluate injured workers and provide their unbiased opinions. The ability to select independent health care providers is an important tool the administrative law judges possess and can utilize to obtain the facts and render prompt and fair decisions. The administrative law judges should be free to select neutral health care providers in whom they have confidence.

Respondent contends it should be given an opportunity to challenge the Assistant Director’s appointment of a neutral health care provider on the grounds that Dr. Bieri lacked either “good standing” or “ability”. Considering both K.S.A. 44-516 and also K.S.A. 1996 Supp. 44-510e(a), the latter of which does not contain language indicating the independent health care provider either be of good standing or possess any ability, the Appeals Board finds the Workers Compensation Act does not contemplate the parties be permitted to challenge the administrative law judge’s appointment of an independent health care provider at the time of appointment. However, evidence of the health care provider’s lack of ability, lack of credentials, lack of good standing, or other pertinent evidence may be presented by the parties in their case in chief such as at the provider’s deposition and, thus, it will be considered by the fact finder in determining how much weight, if any, should be given the provider’s opinion.

Considering the entire circumstances, the Appeals Board finds respondent and its insurance carrier have not been denied the opportunity to be heard and present its evidence regarding Dr. Bieri’s qualifications. The Assistant Director possessed the

authority to appoint an independent health care provider and was not required to conduct an evidentiary hearing to address the doctor's "good standing" or "ability".

(2) Because no transcript exists for the prehearing settlement conference, the Appeals Board can only rely upon the statements of respondent's counsel made in its brief and the letters between counsel and the Assistant Director contained in the administrative file.

Respondent contends the Assistant Director, during the settlement conference, indicated he would "probably" adopt the opinions of the neutral physician. In a letter to respondent's counsel dated March 21, 1997, the Assistant Director indicated he did not recall the statement and the statement, if made, would only reflect his past tendencies to rely upon a neutral physician's opinion. In the letter, the Assistant Director assured counsel that all the evidence would be objectively analyzed.

Assuming respondent's contention is true that the Assistant Director indicated he would "probably" decide the case based upon the neutral physician's opinion, the Appeals Board finds such statement does not indicate the Assistant Director had either prejudged the facts, or was biased or prejudiced in favor of or against any party, or otherwise would not objectively review and consider the entire evidentiary record. The Appeals Board finds the statement indicated an assessment on the Assistant Director's part that he, with all other factors being equal, generally preferred a neutral physician's opinion. The statement must be considered in the context of which it was made.

The Appeals Board also finds the Assistant Director's alleged statement was frank and honest. As a practical matter, one of the potential advantages of utilizing independent health care providers is their theoretical unbiased and disinterested position in the outcome of the litigation, free from the real or imagined pressure to please the party who hired them and paid their bill.

When considering the alleged statement and the context in which it was made, the Appeals Board finds there appears to be no valid reason either to question the Assistant Director's objectivity or to remove him from this proceeding.

(3) Under the provisions of K.S.A. 1996 Supp. 44-551(b)(1), the Appeals Board has the jurisdiction and authority to review this matter. K.S.A. 1996 Supp. 44-551(b)(1) provides in part:

"All acts, findings, awards, decisions, ruling or modifications of findings or awards made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days."

Because this matter arose apart from a preliminary hearing, the limiting language contained in K.S.A. 1996 Supp. 44-534a and K.S.A. 1996 Supp. 44-551(b)(2)(A) which restricts the issues which may be reviewed by the Appeals Board is not applicable.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order dated March 14, 1997, entered by Assistant Director Brad E. Avery should be, and hereby is, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May 1997.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James R. Shetlar, Overland Park, KS  
Gary R. Terrill, Overland Park, KS  
Office of Administrative Law Judge, Overland Park, KS  
Brad E. Avery, Assistant Director  
Philip S. Harness, Director